

In The
Supreme Court of the United States

STATE OF KANSAS,

v.

Plaintiff,

STATE OF NEBRASKA

**KANSAS' BRIEF IN OPPOSITION
TO NEBRASKA'S MOTION TO DISMISS**

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**KANSAS' BRIEF IN OPPOSITION TO
NEBRASKA'S MOTION TO DISMISS**

STATEMENT

1. This Case

The Court granted Kansas' Motion for Leave to File Bill of Complaint on January 20, 1999. 119 S. Ct. 865. The Bill of Complaint generally alleges that Nebraska has violated the Republican River Compact by allowing consumption in Nebraska of water, including groundwater, in excess of Nebraska's allocation under the Compact. See Kansas Bill of Complaint ¶¶ 7-11.

The Court granted Nebraska leave to file a motion to dismiss the Kansas Bill of Complaint on June 21, 1999. 119 S. Ct. 2364. The Court limited the question to be addressed to "whether the Republican River Compact restricts a State's consumption of groundwater." Nebraska filed its Motion to Dismiss (Motion) and Brief in Support (Nebraska Brief) on August 2, 1999.

As Nebraska points out, the allegations of the Kansas Bill of Complaint are deemed admitted for purposes of the Motion. Nebraska Brief 4-5. The allegation of principal importance for purposes of the Motion is that ground-water pumping and consumption in Nebraska are depleting the waters of the Republican River and its tributaries that would otherwise flow to Kansas.

2. The Republican River Basin

The Republican River Basin ("Basin") has been described generally in Kansas' Brief in Support of Motion

for Leave to File Bill of Complaint 2-5. The Basin has been the subject of a number of studies by the United States Geological Survey ("USGS") and other federal agencies. These reports describe the hydraulic connection between the groundwater aquifers and the surface flows of the Basin. In its analysis of the High Plains aquifer (also known as the Ogallala aquifer), which is prevalent in the Basin, the USGS has pointed out that "[t]he base flow of a river represents the ground-water contribution to the river." Richard R. Lucky et al., Digital Simulation of Ground-Water Flow in the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming 38 (USGS Professional Paper 1400-D) (1986); see also Edwin D. Gutentag et al., Geohydrology of the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wyoming 28 (USGS Professional Paper 1400-B) (1984).

The USGS has stated that increased utilization of groundwater from the Ogallala/High Plains aquifer in the upper part of the Basin has had a "substantial effect on water levels in the aquifer and on rates of ground-water seepage from the aquifer into area streams." Jon M. Mckenpaugh et al., Simulated Response of a High Plains Aquifer to Ground-Water Withdrawals in the Upper Republican Natural Resources District, Nebraska 14 (USGS Water-Resources Investigations Report 95-4014) (1995). The USGS has also shown that groundwater pumping in Nebraska has the potential to reduce substantially, even eliminate, the base flow of the Republican River and its tributaries. See *id.*, at 50-59.

The U.S. Bureau of Reclamation has noted the effect of groundwater pumping on stream flows in the Republican Basin, pointing out that wells pumping near a stream can either reverse the flow from the aquifer to the stream or decrease the aquifer's discharge to the stream. Bureau of Reclamation, U.S. Dep't of Interior, Special Report: Republican River Basin Management Study 41-43 (1985). In a more recent study, the Bureau of Reclamation stated:

"[S]ince the late 1960's, the area's overall water supply has decreased, in part because groundwater development in the Republican River Basin has increased. The drilling of wells and the use of groundwater has had an adverse effect on the available flow in the rivers above the reservoirs. Because of this development, inflows to Reclamation reservoirs have steadily decreased" Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin 14 (1996).

3. The Republican River Compact

The Republican River Compact was negotiated in two phases. The first phase of negotiations occurred in 1940 and 1941, resulting in an agreement among the States of Colorado, Nebraska and Kansas on March 19, 1941. See S. 1361, H. R. 5945, 77th Cong., 1st Sess. (1941). After consideration and approval by Congress, however, the bill granting the consent of Congress was vetoed by President Franklin D. Roosevelt on April 2, 1942. Message From the President of the United States Returning Without Approval the Bill (H. R. 5945) Granting the Consent of Congress to Compact Entered Into by the States of Colorado, Kansas, and Nebraska With Respect to the Use

of the Waters of the Republican River Basin. H. R. Doc. No. 690, 77th Cong., 2d Sess., Misc., vol. 1, p. 1 (1942), attached hereto as Appendix J. Although President Franklin D. Roosevelt approved of the purpose of apportioning the waters of the Republican River Basin by compact, the President was concerned that the proposed compact sought to withdraw federal jurisdiction over navigation and to restrict federal authority over water projects. *Ibid.* Congress thereafter passed, and the President signed, an act authorizing further negotiations and appointing a federal representative to participate in those negotiations. Act of August 4, 1942, ch. 545, 56 Stat. 736. The three States agreed to the Republican River Compact in its final form on December 31, 1942. The apportionment of the waters of the Republican River Basin among the States did not change from the apportionment approved by Congress in 1941. Changes were made, however, to address the concerns expressed by the President. The legislatures of each of the three States approved the Compact as modified (Kansas: Act of February 22, 1943, 1943 Kan. Laws 612, codified at Kan. Stat. Ann. § 82a-518 (1997); Nebraska: Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2a Neb. Rev. Stat., App. 1-106 (1995); Colorado: Act of March 15, 1943, 1943 Colo. Laws 86, codified at Colo. Rev. Stat. §§ 37-67-101, -102 (1990)). Congress then passed an act consenting to the Compact, which the President approved on May 26, 1943. 57 Stat. 86.

The Republican River Compact is appended to the Bill of Complaint in this case. Article I declares the major purposes of the Compact, including the equitable division of the waters of the Republican River Basin. Article

II provides definitions of certain central terms. "Virgin Water Supply" is defined to be "the water supply within the Basin undepleted by the activities of man." The term "Beneficial Consumptive Use" is defined to be "that use by which the water supply of the Basin is consumed through the activities of man." Article III sets out the computed average annual Virgin Water Supply for each of the sub-basins. Article III also provides for adjustment of the allocations if the future computed Virgin Water Supply varies more than 10% from that stated in Article III. Article IV provides the specific quantifications comprising the allocation to each of the three States. These are specified in amounts of beneficial consumptive use allowed in each sub-basin in each State, except that a delivery right is specified for Kansas at Guide Rock, Nebraska. Articles V-VIII treat matters of less importance to the current controversy. Article IX provides for joint administration of the Compact by the water officials of each State, who "may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact." Articles X and XI treat the relationship between the States and the Federal Government.

SUMMARY OF ARGUMENT

The Republican River Compact equitably divides the waters of the Republican River Basin among the three compacting States, Colorado, Nebraska and Kansas. Groundwater pumping from both the alluvial and the Ogallala aquifers in Nebraska is presently depleting the surface flows of the Republican River upon which Kansas depends and which are allocated to Kansas under the

Compact. The question whether the Compact restricts consumption of groundwater quickly reduces to whether the compacting parties intended to allow consumption of groundwater to change the Compact allocations among the States. The language of the Compact contains no such exception to the allocations. Further, the Compact apportions the entire virgin flow of the Republican River among the States, including the portion of that flow that is discharged to the river from the groundwater system. Therefore, Kansas understands the plain meaning of the Compact to allow no use of water in the Republican River Basin that would change the Compact allocations to the States.

Kansas' reading of the Republican River Compact is consistent with the Court's interpretation of the Pecos River Compact in *Texas v. New Mexico*, No. 65, Original, and with its interpretation of the Arkansas River Compact in *Kansas v. Colorado*, No. 105, Original.

In addition to the plain meaning of the Republican River Compact, the records of the negotiations and approval of the Compact show that the compacting parties intended to include groundwater consumption in the Compact's official consumptive use allocations to the States in the Compact. The minutes of the Compact negotiations and associated official correspondence of the negotiating Compact Commissioners from each State, together with official statements of the federal officials advising Congress on approval of the Compact, show an unmistakable intention to include groundwater in the Compact allocations.

The arguments that Nebraska puts forward are without merit. The fact that the term "groundwater" is not mentioned in the Compact is of no significance. Nebraska fails to point out that the term "surface water" also does not appear in the Compact. Rather, the Compact negotiators chose the term "Virgin Water Supply" in order to encompass all of the waters affected by the apportionment in the Compact. Nebraska's assertion that the parties previously understood the Compact as not restricting the use of groundwater is contradicted by the very first actions of the States after the initiation of formal Compact administration. For instance, beginning with the First Annual Report of the Republican River Compact Administration, the States have demonstrated their understanding that groundwater consumption, of both alluvial and Ogallala groundwater, was included in the Compact allocations. This understanding is made clear by the Formulas for the Computation of Annual Virgin Water Supply adopted by the Compact Administration and published in the First Annual Report. The provisions on the inclusion of groundwater are still in effect today. It is only recently, since about 1990, that Nebraska has taken the inconsistent position that groundwater consumption is not restricted by the Compact.

Nebraska again misses the mark in arguing that the Court's decision and the amicus brief endorsed by Kansas in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), are somehow inconsistent with Kansas' position that the Republican River Compact restricts consumption of groundwater. Kansas does not assert that the Republican River Compact allocates the groundwater of the Ogallala

Aquifer among the compacting States. Nebraska misap- prehends Kansas' claim as being a claim to "Nebraska's groundwater" in the Ogallala aquifer. Kansas is not seek- ing an equitable apportionment of the Ogallala aquifer. To the contrary, Kansas claims only its equitable portion of the surface flows of the Republican River as deter- mined by the Compact. The Compact prohibits a State from interfering or allowing its citizens to interfere, by any means, including groundwater consumption, with the surface flows apportioned to another State. Thus, allocations of the Virgin Water Supply to Kansas cannot lawfully be diminished under the Compact by ground- water pumping in Nebraska; nor can Nebraska's con- sumption of water from any source in the basin, including groundwater, lawfully exceed Nebraska's por- tion of the Virgin Water Supply.

Nebraska's assertions with regard to decisions in courts of the compacting States that make passing refer- ences to the Republican River Compact are inapposite. In fact, none of those decisions addressed the question whether the Republican River Compact restricts ground- water consumption. In any event, this Court is the only court in the Nation authorized to interpret the Compact authoritatively as between the States.

Finally, Nebraska is currently asserting in *Nebraska v. Wyoming*, No. 108, Original, that the North Platte Decree restricts Wyoming's groundwater use. There, the Court allocated surface waters of the so-called "critical reach" of the North Platte, with no explicit reference to ground- water pumping or consumptive use. Yet Nebraska is claiming that the Decree implicitly requires Wyoming not to deplete flows beyond Wyoming's allocation in the

critical reach by groundwater pumping. Likewise, Kansas is claiming that the Compact in this case requires Nebraska not to deplete flows beyond Nebraska's alloca- tion by groundwater pumping.

◆—————◆

ARGUMENT

I. The Plain Language of the Republican River Com- pact Restricts a State's Consumption of Ground- water to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States.

A major purpose, indeed the core purpose, of the Compact is to provide an equitable division of the waters of the Republican River Basin. Art. I, ¶ 1. To deprive a State of some or all of its Compact allocation is inconsis- tent with that purpose. Thus, consumption of ground- water that deprives a downstream State of its allocation must be either limited or offset to avoid the diminishment of the Compact allocation to the downstream State.

Article II of the Compact defines "Virgin Water Sup- ply" as "the water supply within the Basin undepleted by the activities of man." Clearly, pumping and consumption of groundwater are "activities of man." Moreover, pump- ing and consumption of groundwater are "activities of man" that have great potential to deplete the water sup- ply within the Basin. These central terms of the Compact reflect the intent of the compacting parties that no State should deplete the water supply of the basin by the activities of man except to the extent of that State's alloca- tion.

The Compact allocates all of the Virgin Water Supply among the three States: the total Virgin Water Supply is quantified in Article III as 478,900 acre-feet, which is equal to the sum of the allocations to the three States in Article IV (54,100 acre-feet to Colorado, 190,300 acre-feet to Kansas, and 234,500 acre-feet to Nebraska). Thus, all activities of man that deplete the Virgin Water Supply must be included in the allocation of the State in which they occur. For the purposes of this Motion, it is admitted that groundwater consumption in Nebraska is depleting the surface flows of the Republican River. These depletions must therefore be included in Nebraska's Compact allocation.

Since 100 percent of the Virgin Water Supply is allocated among the States, excessive use by an upstream State, if not offset, will unavoidably deprive a downstream State of its allocated share. Nebraska therefore has a duty under the Compact not to exceed its allocation and thereby to deprive Kansas of its allocation.

For instance, Kansas is entitled to a surface water supply for beneficial consumptive use at Guide Rock, Nebraska of 138,000 acre-feet, as adjusted:

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified . . . :

* * *

From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water

supplies from upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska" Art. IV, ¶¶ 3-4.

It would offend the core purpose of the compacting parties to deprive Kansas of some or all of its Guide Rock allocation of surface flows by pumping and consumption of groundwater for irrigation in Nebraska which, when added to the consumption of surface water in Nebraska, causes Nebraska to exceed its allocation. In other words, the Compact expressly limits beneficial consumptive use in each State and provides expressly for delivery of water to Kansas. It was the intention of the compacting States and Congress that those requirements be met. Nebraska's argument to the contrary should be rejected.

II. The Records of the Negotiations and Approval of the Republican River Compact Show that the Compact was Intended to Restrict a State's Consumption of Groundwater to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States.

Kansas believes that the Compact means what it says and that there is no ambiguity regarding whether certain beneficial consumptive uses of water in the Basin (i.e., uses of groundwater) are exempted from the requirements agreed to in the Compact. If it were determined, however, that the Compact is ambiguous, resort to the records of the negotiations and approval of the Compact would be appropriate. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991); see *id.*, at 248-250 (Rehnquist, C.J.,

dissenting). But even if the records of the negotiations and approval of the Compact are consulted, they simply confirm that groundwater consumptive use was meant to be accounted for in the Compact allocations.

The Republican River Basin suffered devastating floods in 1935 and 1936, which led to a number of pleas for federal help with regard to water projects. See, e.g., 80 Cong. Rec. 8485-86 (June 1, 1936) (statement of Sen. Norris); 86 Cong. Rec. App. 58 (Jan. 4, 1940) (statement of Rep. Curtis). Federal officials were amenable to providing federal assistance to the States, but they insisted that the States first agree by compact to a binding equitable apportionment of the waters of the Republican River Basin. This became the driving force behind the negotiation of a compact. For instance, in early 1940, Nebraska Governor R. L. Cochran wrote to E. Porter Ahrens, the President of the Kansas Republican Valley Irrigation and Flood Control Association, with regard to the effort to negotiate a compact:

“Mr. Page, Commissioner of Reclamation, stated at the Denver meeting of the Reclamation Association that a compact between states was absolutely essential as a condition precedent to any project approval on the part of the Reclamation Service.” R.L. Cochran Letter to E. Porter Ahrens, January 11, 1940, attached hereto as Appendix A.¹

¹ For reference, letters and memoranda relied upon in this Brief are transcribed in the Appendices. Copies of the original documents and an authenticating affidavit will be lodged with the Supreme Court Clerk and delivered to the parties.

And once the compact was negotiated, the Bureau of Reclamation relied upon the consumptive use allocations in the Compact to protect inflows to the planned projects.²

During their negotiations, the Compact Commissioners representing each of the States received information from the Federal Government with respect to groundwater use planned for the Republican River Basin. And the Commissioners assured the federal planners that such groundwater use was within the basin water supply that they were intending to allocate by compact. Specifically, in the fourth meeting of the Republican River Compact Commission at Topeka, Kansas on January 27-28, 1941, representatives of the U.S. Bureau of Agricultural Economics (“BAE”), including Harry P. Burleigh, “appeared before the Commission and outlined the scope of the

² In planning for the Bostwick Project, which relies on the inflows to Harlan County Reservoir, the Bureau of Reclamation’s Definite Plan Report stated, “The number of acres that can be irrigated has been determined from the water supply remaining after making allowances for complete use of Republican River Compact allocations in upstream states.”¹ Bureau of Reclamation, U.S. Dep’t of Interior, Definite Plan Report, Bostwick Division 56 (1953). The Bureau of Reclamation’s projected depleted annual inflow to Harlan County Reservoir from the Definite Plan Report can be compared to the actual inflows. The total net shortfall in inflows to Harlan County Reservoir for the water years 1961-1994 amounts to well over four million acre-feet. See *id.*, Part 3, App. II; Bureau of Reclamation, U.S. Dep’t of Interior, Resource Management Assessment, Republican River Basin 29 (1996). This shortfall is shown graphically in the fold-out Appendix A to Kansas’ Reply to Nebraska’s Brief in Opposition and to Nebraska’s Request for Oral Argument (filed August 1998).

work which the Bureau has been carrying on thruout [sic] the Republican River basin to determine the extent and useability of the underground waters of the basin." Minutes of the Fourth Meeting of the Republican River Compact Commission at Topeka, Kansas on January 27-28, 1941, attached hereto as Appendix B. After discussing the particulars relating to the groundwater report that the BAE was then preparing, the Minutes of the Fourth Meeting state as follows:

"Mr. Burleigh . . . presented the Commission with a tabular statement showing estimated amounts of underground water available in the various basins in the Republican River basin in the three states and amounts of land to which such water supplies could be applied within the economic limits he had assumed.

"Mr. Burleigh advised the Commission that, in view of the fact that numerous applications had been made to his department by landowners thruout [sic] the basin, he was desirous of obtaining a statement from the Commission as to whether the amounts of *underground waters* he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the *allotments of water to each state* which the Commission may have agreed upon; that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state.

"He advised the Commission also that his department is advising with the U.S. Bureau of Reclamation with a view of reaching an understanding concerning the scope of future developments within the basin, both of surface and

underground waters, which would not be overlapping in effect Upon inquiry, Mr. Burleigh advised the Commission that *all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin,* as reflected in measurements of stream flow at Scandia and other points in the basin, and that *any underground water developments must be considered as reducing to that extent the amount of surface water available for use within the basin."* *Ibid.* (emphasis added).

Mr. Burleigh's desire for a statement from the Commission was soon satisfied. On January 31, 1941 the Colorado Commissioner, M.C. Hinderlider, wrote to his fellow Commissioners, George S. Knapp of Kansas and Wardner G. Scott of Nebraska, with reference to Mr. Burleigh's request:

"It is my understanding that Mr. Knapp will address a letter to Engineer Burleigh of the Bureau of Agricultural Economics, advising him that the commissioners are in agreement that the estimated amount of ground water which may be developed in each of the tributary basins of the Republican River basin are within the allocations which the Commission has tentatively made." January 31, 1941 M.C. Hinderlider Letter to George S. Knapp and Wardner G. Scott, attached hereto as Appendix C.

Actually, Mr. Knapp had already addressed that letter to Mr. Burleigh on the day before, January 30, 1941. His letter reads in its entirety:

January 30, 1941

Mr. Harry P. Burleigh,
Hydraulic Engineer,
Bureau of Agricultural Economics,
Amarillo, Texas.

Dear Mr. Burleigh:

We, the Republican River Compact Commissioners on the Republican River, meeting at Topeka on January 28, examined the tables which you submitted to us on the 27th indicating the approximate recommendations for consumptive use of water by basins in the three states, and find that the total estimated annual consumptive use of water is within the amount of the water supply available in the basin above Hardy, and that the proposed allocations in each of the several states fall within the amounts which the Commission may see fit to allocate to each state.

Please accept our thanks for meeting with us and supplying us with these figures.

Sincerely yours,

Geo. S. Knapp
Commissioner for Kansas
For the Commission

GSK:MM
CC to M. C. Hinderlider
Wardner Scott

Thus, the Commissioners jointly notified the U.S. Bureau of Agricultural Economics that the groundwater amounts considered feasible for the various sub-basins within the Republican River Basin were within the basin Virgin Water Supply that they were considering for allocation in the Compact.

The deliberations of the Commissioners of the three states resulted in an agreement in Denver on March 19, 1941. The next day, Colorado's Commissioner, M.C. Hinderlider, addressed a letter to Ralph L. Carr, the Governor

of Colorado, which included a specific reference to the reliance of the Commission on "a voluminous report of the Bureau of Agricultural Economics of the U.S. Department of Agriculture on the underground water resources of the Republican River basin and their availability for beneficial application to the future development of the basin." M.C. Hinderlider Letter to Ralph L. Carr, March 20, 1941, attached hereto as Appendix E. Mr. Hinderlider then proceeded to describe the specific allocation to his State in the following words: "*The compact allocates to Colorado, its citizens, agencies, associations and corporations all of the surface and underground water supplies originating in Colorado within the Frenchman and Red Willow Creek drainage basins*" *Ibid.* (emphasis added). This reaffirms the Colorado Commissioner's understanding that groundwater use was intended to be included in the allocations made in the Compact.

There are also strong indications that the Federal Government shared the understanding of the State commissioners that groundwater use was included in the consumptive use allocations in the Compact. The U.S. Bureau of Reclamation's Chief Engineer S.O. Harper received a memorandum dated May 21, 1941 from another Bureau of Reclamation official, J.R. Riter, which included a discussion of the term "Virgin Water Supply" as that term was used in the proposed compact. Mr. Riter stated:

"Under the compact each state is accorded a limited 'beneficial consumptive use' regardless of whether such waters are derived from virgin natural flow, captured storage water,

return flow from irrigation, *groundwaters recovered by pumping*, recovered waste water, or otherwise. In short, the compact merely defines the extent to which streams may be depleted regardless of the methods of use." J.R. Riter Memorandum to S.O. Harper, May 21, 1941, attached hereto as Appendix F (emphasis added).

Riter concluded by saying that he "believed that the compact as prepared accomplishes the purposes set forth in the preamble thereof, and that it should be ratified by Congress." *Ibid.* Harper, the Chief Engineer of the Bureau of Reclamation, subsequently endorsed Riter's views in a transmittal to the Commissioner of Reclamation dated May 24, 1941, attaching the full Riter memorandum. The May 24, 1941 transmittal of the Chief Engineer is attached hereto as Appendix G.

Further, the Bureau of Reclamation's engineer in charge of the Republican River investigations, C.T. Judah, in a letter to the Bureau's Chief Engineer, described meetings he had attended that were held to acquaint county land use planning committees with the Bureau of Agricultural Economics' plans to develop groundwater:

"Overlapping interests of both agencies were pointed out to local interests and fundamental differences in types of developments were explained. A special effort was made to impress on local people that *water supplies for both ground water pumping and for gravity stream diversions were from the same source* and that *new developments supplied by either source would be limited to the amount of water allocated to each state under the*

proposed compact." C.T. Judah Letter to S.O. Harper, May 31, 1941, attached hereto as Appendix H (emphasis added).

This letter indicates that federal water officials were fully cognizant of the hydraulic connection between surface water and groundwater in the Republican River Basin and that considerable efforts had been made to impress that fact on people in the basin. Moreover, it shows the conviction of federal water officials that the allocations to each State under the proposed compact applied to uses made of both surface water and groundwater.

The thorough understanding of the hydraulic relationship between groundwater and surface water among federal water officials is shown by a statement of the same Bureau of Reclamation engineer in charge of Republican River investigations. In a memorandum to the Bureau's Hydraulic Engineer, concerning the draft BAE report, he states:

"There is a general conflict of interest in the basin between the B.A.E. and the Bureau of Reclamation, since *consumptive use of water on areas irrigated by pumping from wells will naturally deplete river flows available for development similar to those the Bureau may contemplate.*" C.T. Judah Memorandum to Hydraulic Engineer, U.S. Bureau of Reclamation, March 17, 1941, a transcription of which is attached hereto as Appendix D (emphasis added).

As noted above, the compact that was negotiated in 1940 and 1941 was ultimately vetoed by President Roosevelt on April 2, 1942. Through subsequent negotiations in which a federal representative participated, the proposed

compact was then altered to address the concerns expressed by President Roosevelt. The apportionment among the States in the various sub-basins of the Republican River was not changed, however. *Compare* H. R. 5945, 77th Cong. 1st Sess. Art. III (1941), attached hereto as Appendix I, *with* S. 649, 78th Cong. 1st Sess. Art. IV (1943), attached hereto as Appendix K. The Colorado Commissioner, Mr. Hinderlider, confirmed the retention of the earlier apportionment in his letter to the Governor of Colorado forwarding the second version of the Compact: "The draft of the Compact, herewith transmitted, does not in any way change the allocations of water to the signatory States provided for in the former Compact." M.C. Hinderlider Letter to Governor Ralph L. Carr, January 9, 1943, attached hereto as Appendix L. Significantly, Mr. Hinderlider confirmed that the allocations in the final Compact applied not only to surface water but to groundwater uses as well: "These allocations include not only surface, but also sub-surface, or underground water supplies." *Ibid.*

Colorado Commissioner Hinderlider also prepared an explanatory statement and report to the 34th General Assembly of Colorado, which is reproduced and attached hereto as Appendix M. In that report, Commissioner Hinderlider stated, "It is believed that this Compact equitably apportions the total available average annual virgin water supplies of the Basin, both surface and underground, among the three signatory States" *Id.* at M10.

Mr. Hinderlider submitted his report not only to his own legislature in Colorado, but also to the federal representative, Glenn L. Parker, and to George S. Knapp and

Wardner G. Scott, the Kansas and Nebraska Commissioners, respectively. M.C. Hinderlider Letter to Glenn L. Parker, February 5, 1943, a transcription of which is attached hereto as Appendix N. In his letter, Commissioner Hinderlider said, "I would be pleased to have your observations, criticisms, etc., on my explanatory article." *Id.* No record of any response to this request has been found. Soon thereafter, the State legislatures approved the Compact. As noted above, the State of Kansas approved the Compact on February 22, 1943, the State of Nebraska approved the Compact on February 24, 1943, and the State of Colorado approved the Compact on March 15, 1943. Thus, there is definitive evidence that all three State commissioners and the federal representative collectively understood, at the time of the approval of the Compact by their respective governments, that the use of both surface and underground waters within the basin was included in the allocations in the Compact.

As the foregoing records of the negotiations and related correspondence and legislation reflect, the Compact Commissioners representing each of the Compacting States and the federal officials advising the Compact Commission and the Federal Government all understood, at times critical to the negotiations and ratification of the Compact, the hydraulic connection between groundwater and surface water in the Republican River Basin and the intent of the Compact to include consumptive use from both surface water and groundwater in the Compact allocations.

III. Nebraska's Arguments that the Compact Does Not Restrict Consumption of Groundwater Are Without Merit.

A. Nebraska Misstates the Kansas Claim.

Nebraska begins its Brief with the statement, "In its Complaint, Kansas lays claim to vast quantities of groundwater located in Nebraska." Nebraska Brief 1. It also states, "Kansas' claim to Nebraska's groundwater is, therefore, a claim for which Kansas cannot be granted relief." *Id.*, at 5. Nebraska fundamentally misapprehends Kansas' claim. Kansas is not "lay[ing] claim to vast quantities of groundwater located in Nebraska." Neither is Kansas laying claim to "Nebraska's groundwater." Rather, Kansas is simply claiming that Nebraska has exceeded its consumptive use limitations under the Republican River Compact when all of Nebraska's consumptive use of Republican River surface waters and hydraulically connected groundwaters in the alluvial and Ogallala aquifers is taken into account. See Bill of Complaint ¶¶ 7-11. Because the Compact allocates all of the Virgin Water Supply of the Republican River Basin, overuse by Nebraska has resulted in depletion of surface flows to the State of Kansas. Nevertheless, Nebraska may allow a certain amount of pumping of alluvial and Ogallala groundwater, so long as the effects of such pumping on the surface flows of the Republican River are offset as necessary to keep Nebraska's total consumptive use within Nebraska's Compact allocation.

B. The Term "Virgin Water Supply" Includes Both Surface Water and Tributary Groundwater.

Nebraska argues that the absence of the word "groundwater" or like terms in the Compact must lead to the conclusion that the Compact does not restrict consumption of groundwater. Nebraska Brief 3, 5, 8-10. Nebraska fails to point out, however, that the term "surface water" also does not appear in the Compact. The term used is "Virgin Water Supply," which is defined to be "the water supply within the Basin undepleted by the activities of man." Art. II, ¶ 3. This term is not limited either to surface water or groundwater, but reflects the intent of the compacting States to allocate the entire flow of the Republican River as it would occur undepleted by any activities of man. As demonstrated above, when the Compact was drafted, the activities of man most likely to deplete the Virgin Water Supply were surface water diversions and groundwater pumping. Both are clearly "activities of man," and both were known to deplete surface flows at the time of the Compact.

Nebraska's argument is simplistic. The question is not whether groundwater was apportioned by the Compact, but whether the States and Congress, in apportioning the Virgin Water Supply, intended to account for the effects of any activities of man in the basin on the flows of the river other than direct diversion of river flows. Obviously they did, because they defined the Virgin Water Supply generally as the water supply "undepleted by the activities of man." In other words, to the extent that groundwater pumping, an activity of man, depleted

river flows, the negotiators intended that such groundwater pumping be restricted by the Compact.

Nebraska anticipates that Kansas will argue that this Court has previously found groundwater to be apportioned by compacts even though they did not contain the word "groundwater." Nebraska Brief 10. Again, however, the Nebraska formulation is simplistic. The question is not whether previous decisions of the Court have determined that groundwater was apportioned by other compacts but whether such compacts restricted groundwater consumption, as stated in the Court's delineation of the question for Nebraska's Motion to Dismiss. The two leading decisions addressing that question are *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 482 U.S. 124 (1987). Nebraska does not deny that in both of these cases the Court found a violation of an interstate compact allocating surface flows that had been excessively depleted by groundwater pumping.

In *Kansas v. Colorado*, the Court specifically held that post-compact well pumping in Colorado had violated the Arkansas River Compact. 514 U.S. at 693-694. The Court so held despite the fact that the Arkansas River Compact does not use the word "groundwater" or like terms. See *Kansas River Compact*, 63 Stat. 145 (1949).

The Pecos River Compact, 63 Stat. 159 (1949), is another interstate river compact that apportions surface flows without mentioning groundwater. Yet the Court enforced the Pecos River Compact against New Mexico for depletions caused largely by groundwater consumption. As the Court noted, "If development in New Mexico were not restricted, especially the groundwater pumping

near Roswell, no water at all might reach Texas in many years." *Texas v. New Mexico*, 462 U.S. 554, 557 (1983); see also *id.* at 557-558 nn. 2, 3. The centrality of the concern about groundwater pumping in *Texas v. New Mexico* is confirmed by Special Master Jean S. Breitenstein's September 7, 1979 Report, which states, at page 44: "Although hidden in a mass of semantics and mathematics, the heart of this controversy is the pumping of ground water in New Mexico." When the Court entered an injunction against New Mexico to comply with the Pecos River Compact, 485 U.S. 388 (1988), the Court was effectively restricting the use of groundwater in New Mexico even though the Pecos River Compact said nothing expressly about groundwater.

Nebraska responds that the States of New Mexico and Colorado simply "failed to plead or argue that groundwater was not subject to their respective Compacts." Nebraska Brief 10 (emphasis in original). But, while the States of Colorado and New Mexico may not have been bold enough to claim that groundwater was not restricted under those Compacts, the amount of depletion by groundwater pumping was a point of contention in both cases, and the Court was fully aware of the groundwater consumption element. Moreover, each State had officially recognized the potential of groundwater pumping to deplete river flows by the time the respective complaints were filed. The Motion for Leave to File Bill of Complaint in *Texas v. New Mexico*, No. 65, Original, was granted in 1975. 421 U.S. 927. Thirteen years earlier, for purposes of intrastate water administration, the New Mexico Supreme Court had formally recognized the potential for groundwater pumping to deplete

surface flows. See *City of Albuquerque v. Reynolds*, 72 N.M. 428, 379 P.2d 73 (1962). Similarly, in *Kansas v. Colorado*, No. 105, Original, the Motion for Leave to File Complaint was granted in 1986. 475 U.S. 1079. Colorado had recognized the interconnection of surface water and groundwater at least as early as 1965, when it enacted legislation formally requiring conjunctive administration of surface water and groundwater. 1965 Colo. Laws, ch. 318, § 1. Nebraska has still not fully recognized the potential of groundwater pumping to deplete surface flows, and therein may lie the reason that Nebraska is making the present argument while New Mexico and Colorado did not.

Nebraska suggests that it is significant that none of the compacting States regulated groundwater within the State at the time that the Compact was adopted. Nebraska Brief 16. The relevance of this assertion is not altogether clear. Moreover, as shown above, the defendant States in the *Texas v. New Mexico* and *Kansas v. Colorado* compact enforcement proceedings did not regulate groundwater at the time that the Pecos River and Arkansas River Compacts were adopted. Nevertheless, the lack of intrastate regulation of groundwater did not deter this Court from interpreting the compact in each case to effectively limit groundwater use pursuant to the compact allocations.

Nebraska argues that the lack of development on the Republican River at the time of the Compact is grounds for distinguishing the Republican River Compact from the Arkansas River and Pecos River Compacts. Nebraska Brief 10. The claimed distinction is without substance, however. Each of the three Compacts set a certain interstate apportionment of the waters of each stream. The

question is the same in each case: Did the parties to the Compact intend that the apportionment to which they had solemnly agreed could be circumvented by means of groundwater pumping in the upstream State? Kansas submits that the parties to the Republican River Compact could not have so intended. This Court made the same implicit determination in *Texas v. New Mexico*, 482 U.S. 124 (1987), and in *Kansas v. Colorado*, 514 U.S. 673 (1995).

C. *The Sporhase Decision and the Brief Endorsed by Kansas in that Case are Consistent with Kansas' Position that the Compact Restricts Consumption of Groundwater.*

Nebraska overstates the Court's passing reference to the Compact in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), when it claims that the "Court previously noted the Compact concerns surface water rather than groundwater." Nebraska Brief 1; see also *id.*, at 3, 11-12. The Court was faced in that case with the State of Nebraska's "suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." 458 U.S., at 958. The Court held that the federal statutes deferring to state water law and interstate compacts "do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.*, at 959-960. Thus, the Court was not considering the present question, namely, whether the Republican River Compact restricts groundwater pumping in the Republican River basin for purposes of the consumptive use limitations in the Compact and the delivery obligations downstream to Kansas. Nevertheless, the passing remark by the Court that "[t]he

interstate compacts to which appellee refers are agreements among States regarding rights to surface water," *id.*, at 959, is correct. The Virgin Water Supply under the Republican River Compact is the flow that would occur in the River if it were undepleted by man's activities. Thus, there is nothing inconsistent between even the brief reference to the Republican River Compact in *Sporhase* and the position urged by Kansas in this case.

Nebraska urges that an amicus brief filed in support of Nebraska in the *Sporhase* case by Colorado, which Kansas endorsed, is inconsistent with Kansas' position that the Compact restricts groundwater consumption in this case. Nebraska Brief 1, 2, 4, 12-13. Contrary to Nebraska's suggestion, however, Kansas is not claiming that the Ogallala aquifer has been apportioned to Kansas. Rather, Kansas contends that the natural discharges from that aquifer to the Republican River and its tributaries cannot be depleted by the activities of man without accounting for those depletions as beneficial consumptive use under the Republican River Compact.

D. The States Have Traditionally Administered the Compact on the Basis that Groundwater Consumption Is Restricted by the Compact.

The First Annual Report of the Republican River Compact Administration ("RCCA") states that on April 4, 1961 the Administration accepted "Formulas for the Computation of Annual Virgin Water Supply, Republican River Basin" ("VWS Formulas") proposed by the Administration's Committee on Procedure for Computation of Annual Virgin Water Supply. RCCA, 1st Annual Report 2

(1961). An excerpt of the VWS Formulas is attached hereto as Appendix O. The formulas for each of the sub-basins' Virgin Water Supply add in "the irrigation diversions from groundwater" and subtract "the return flows from the lands irrigated by diversions from groundwater." VWS Formulas 6-14. Thus, the consumptive use, which is the difference between diversions and returns, is included as part of the Virgin Water Supply determination. The General Procedures in the VWS Formulas provide, however, that the groundwater referred to in the formulas shall be limited to the alluvium until further information is available on wells outside the alluvium. The General Procedures are attached hereto as Appendix O to this Brief. The paragraph in the General Procedures regarding groundwater diversions reads as follows:

"Irrigation diversions from ground water shall be limited to those by wells pumping from the alluvium along the stream channels. The determination of the effect of pumping by 'table-land' wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows. The groundwater representatives of the Geological Survey and the University of Nebraska reported that the effect of pumping by 'table-land' wells is not subject to an exact determination and that it is possible those wells may not appreciably deplete stream flows. The wells in the Frenchman Creek drainage basin in Colorado have been considered as 'table-land' wells." Formulas for the Computation of Virgin Water Supply,

Republican River Basin, General Procedures, a transcription of which is attached hereto as Appendix O.

"Table-land" wells are the non-alluvial wells pumping from the Ogallala aquifer.

The VWS Formulas reveal the understanding of the chief State water administrators in several respects as of the inception of the formal administration of the Compact. First, only alluvial groundwater is immediately included in the formulas. Second, inclusion of the effects of "table-land" (Ogallala) pumping is deferred until the nature of those effects is better known. Third, once the effects of Ogallala pumping are known, those effects are to be included in the formulas. Thus, the first actions to actively administer the Compact included formulas adopted by all three States recognizing that groundwater consumptive use must be accounted for in administering the Compact. The understanding of the water administrators of the compacting States included both alluvial and Ogallala pumping as being within the allocations of the Compact to the extent that they affect the flows of the Republican River and its tributaries.

For some three decades, the three States adhered to the initial understanding of the States' chief water officials that the effects of both alluvial and Ogallala pumping on the Republican River and its tributaries were to be included in determinations of the Virgin Water Supply to the extent that they could be determined. Alluvial well pumping was assumed to affect the surface flows immediately to the full extent of the consumptive use. Ogallala well pumping was explicitly reserved until the effects of such pumping could be quantified. The formulas

embodying that understanding are still in effect today. Nor has any of the three States suggested amending those Formulas with regard to the inclusion of groundwater consumptive use. It was not until approximately 1990 that Nebraska began separately to take the position that groundwater pumping was not restricted by the Compact. See, e.g., RRCA, 30th Annual Report 13 (1990).

There is little substance to Nebraska's claim that "[h]istorically, none of the states have viewed the Compact as authorizing the regulation, allocation or distribution of groundwater." Nebraska Brief 3. Nebraska does not even refer to the Administration's annual reports in making its assertion. Rather, Nebraska relies on largely irrelevant decisions of the various State supreme courts. *Id.* at 3, 13-15. Early in its Brief, Nebraska states, "The Nebraska Supreme Court has never held that the Compact authorizes the regulation, allocation or distribution of groundwater," citing *State ex rel. Douglas v. Sportluse*, 208 Neb. 703, 305 N.W. 2d 614 (1981). Nebraska Brief 3. That decision of the Nebraska Supreme Court does not even mention the Republican River Compact, however. Therefore, it seems a questionable basis upon which to draw any conclusion regarding the meaning of the Republican River Compact.

Nebraska next relies on *State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944), to support its contention that the "Kansas Supreme Court has never recognized the Compact as a state or federal law creating the authority to regulate the use of groundwater." Nebraska Brief 13. Here again, the Republican River Compact was never mentioned. That case concerned the Equus Beds in south-central Kansas, a

considerable distance from the Republican River Basin. The question was whether the State had statutory authority to regulate the use of groundwater from the Equus Beds. The Court held that the State officials had no authority to regulate groundwater use from the Equus Beds. That holding, therefore, does not support Nebraska's contention. Again, the contention itself, even if true, would be of questionable value.

The *Kansas State Board of Agriculture* case is a slender reed on which to rest an authoritative interpretation of the Republican River Compact. The Kansas Supreme Court did not even mention the Republican River Compact in that case. Thus, the Supreme Court of Kansas was certainly not considering the question now before this Court, namely, whether, as between States, groundwater pumping can be restricted in order to provide each State its allocation under the Republican River Compact.

Nebraska incorrectly analyzes the Kansas case of *State ex rel. Emery v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949). Nebraska Brief 14. In that case, the Supreme Court of Kansas was asked to rule upon the constitutionality of the Kansas Water Appropriation Act of 1945 which had been adopted partially in response to the earlier ruling of the Supreme Court of Kansas in *Kansas State Board of Agriculture*. The Kansas Supreme Court upheld the constitutionality of the new Act. Whether the Republican River Compact restricted groundwater use in another state, the question in this case, was not at issue.

Nebraska also cites *Pioneer Irrigation District v. Colorado*, 658 P.2d 842 (Colo. 1983) for the proposition that the Colorado Supreme Court has concluded that the Compact

regulates surface water only. Nebraska's reliance on *Pioneer Irrigation District v. Colorado* is misplaced. The issue before the Colorado Supreme Court was a different one, namely, whether the Colorado Groundwater Commission was the proper forum to make the initial determination of facts affecting its administrative jurisdiction. That case did mention, however, an earlier administrative determination by the Colorado Groundwater Commission that was based on the very legal principle asserted by Kansas in this Brief: If groundwater use affects surface flows of the Republican River and its tributaries, that groundwater use is subject to the Republican River Compact.

E. Only this Court Can Authoritatively Interpret the Compact as Between the States.

Nebraska's reliance on State supreme court decisions also founders at a more fundamental level. State supreme courts lack jurisdiction to determine interstate controversies. *E.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951):

"It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States is . . . the function and duty of the Supreme Court of the Nation."

That jurisdiction is explicitly reserved to this Court under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a). Thus, while an interstate compact may be relevant to the disposition of a dispute between parties other than the compacting States, no other court has jurisdiction to decide controversies between States that arise under a compact. See *Mississippi v. Louisiana*, 506 U.S. 73 (1992). *Mississippi v. Louisiana* originated as a property dispute between rival private claimants, the outcome of which depended upon whether the land in dispute was located in Mississippi or Louisiana. While a decision of the lower courts was allowed to stand as between the private litigants, the lower court determination of which State encompassed the land in dispute was not binding as between the States even though the States were parties to the litigation. Likewise, the State supreme court decisions relied upon by Nebraska are without any legal effect as between the States. The respective rights of the States under the Republican River Compact can be decided by this Court alone.

F. Nebraska's Position is Inconsistent with Its Position in *Nebraska v. Wyoming*, No. 108, Original.

In *Nebraska v. Wyoming*, No. 108, Orig., Nebraska has taken the position that increased groundwater pumping in Wyoming "is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River. . . ." *Nebraska v. Wyoming*, 515 U.S. 1 (1995), Special Master Third Interim Report, Nebraska's Amended Petition ¶ 11, App. D at D-4 to D-5 (Sept. 9,

1994). Nebraska prays for an order "enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." *Id.*, at D-6 to D-7. The Decree that Nebraska claims has been violated by Wyoming's groundwater uses was entered by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953). That Decree makes no mention of groundwater in its apportionment. Nevertheless, Nebraska alleges that Wyoming's upstream groundwater development is violating Nebraska's equitable apportionment of surface water. Likewise, Kansas alleges in this case that Nebraska's upstream groundwater development is violating Kansas' equitable apportionment of surface water. Thus, Nebraska's allegations in *Nebraska v. Wyoming* support Kansas' position that the Republican River Compact restricts a State's consumption of groundwater.

CONCLUSION

Nebraska's Motion to Dismiss should be denied.

Respectfully submitted,

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